



Via Electronic Mail and United States Postal Service

May 6th, 2019

Ben Steffen, Executive Director
Maryland Health Care Commission
4160 Patterson Ave
Baltimore, MD 21215
ben.steffen@maryland.gov

Re: Interested Party Written Comments for Docket No. 18-24-2430

Dear Executive Director Steffen,

On behalf of United Workers, Charmed City Land Trust, and Sanctuary Streets, we are submitting Reply to Johns Hopkins Bayview Medical Center's (JHBMC) Response to Interested Party Comments (submitted April 11th, 2019) regarding the Application for Certificate of Need submitted by Johns Hopkins Bayview Medical Center-Docket No.18-24-2430.

Please direct all future communications to Peter Sabonis of United Workers and Charm City Land Trust (peter@nesri.org), and Chelsea Gleason of Sanctuary Streets (chelsea.gleason@gmail.com).

Thank you for your consideration.

Respectfully submitted,

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Peter Sabonis
United Workers
Charm City Land Trust

A handwritten signature in black ink, appearing to be "Chelsea Gleason".

Chelsea Gleason
Sanctuary Streets

cc: Kevin McDonald, Chief, Certificate of Need, Maryland Health Care Commission
(kevin.mcdonald@maryland.gov)

Response to Johns Hopkins Bayview Medical Center's (JHBMC) Response Comments from 4/11/2019

**Regarding the Application for Certificate of Need Submitted by Johns Hopkins
Bayview Medical Center (Rehab) - Docket No. 18-24-2430**

On behalf of United Workers, Charmed City Land Trust, and Sanctuary Streets (Community Groups), we are submitting this reply to JHBMC's response to our Interested Party Comments submitted April 11, 2019, regarding JHBMC's Certificate of Need application, Docket No. 18-24-2430. We oppose JHBMC's motion to strike the Community Groups' reply comments submitted on March 25, 2019. Our response to the issues JHBMC raises in its April 11, 2019 filing are laid out below. In addition, due to the fact that JHBMC has taken issue with the accuracy of our analysis of its medical debt collections practices, and the willingness of former JHBMC and Johns Hopkins Hospital patients to give testimony regarding Johns Hopkins' failure to inform them about the availability of charity care (discussed below on pages 9 and 10), we are restating our request for an evidentiary hearing to present oral arguments detailing the accuracy and merit of our claims, prior to the preparation of a proposed decision regarding Certificate of Need approval.

JHBMC Was Required to File a Motion to Exclude the Community Groups' Comments from This

Review

JHBMc once again argues that it properly challenged the Community Groups' standing to be interested parties in its response to their interested party comments, instead of a motion. However, this argument fails, because it distorts CON regulations.

While it is true that COMAR 10.24.01.08(F)(3)(a) permits an applicant to submit only one filing "responding to all written comments" of interested parties, CON regulations explicitly require applicants to address issues like interested party standing through an alternative avenue—a motion:

(3) The following actions **shall be** taken by motion:

- (a) A demand for an action which the movant desires the Commission, the reviewer, or the staff of the Commission to take;**
- (b) A request for reconsideration, under Regulation .19 of this chapter;
- (c) An objection to the introduction of a statement or other evidence by a party during an evidentiary hearing held under Regulation .11 of this chapter;
- (d) A challenge to a reviewer or other member of the Commission;
- (e) An action that might be initiated properly or undertaken by a party to a review, and that is not otherwise provided for in these regulations; **and**
- (f) Any other question that is justiciable.¹**

COMAR 10.24.01.10(B) (emphases added)

It is reasonable to infer that the one filing permitted under COMAR 10.24.01.08(F)(3)(a) is meant to address the interested parties' *substantive* comments under COMAR 10.24.01.08(F)(1)(b)-(c).

Here, JHBMc requested that the Commission Reviewer exclude the Community Groups' comments from consideration on the grounds that the groups lack interested party standing. This constitutes both "[a] demand for an action which the movant desires the Commission..." to take, *and* inherently constitutes a "question that is justiciable." Accordingly, JHBMc's challenge to the inclusion of the Community Groups' interested party comments necessarily required a motion. The Commission

¹ Merriam-Webster defines "justiciable" as "capable of being decided by legal principles or by a court of justice." Merriam-Webster, "Definition of justiciable," available at <https://www.merriam-webster.com/dictionary/justiciable>.

ought not consider JHBMC's arguments in reaching its decision on whether the Community Groups constitute interested parties for the purposes of this proceeding.

The Community Groups Do Have Interested Party Status

JHBMC once again disputes that the Community Groups are "interested parties" for the purposes of this CON review proceeding. It argues that the groups are not "adversely affected" under the Commission's regulations defining an "interested party." However, JHBMC's attack on the Community Groups' status as interested parties fails for the following reasons.

JHBMC continues to incorrectly conflate "interested party" status in the CON review proceeding with "aggrieved party" status for the purpose of judicial appeal. To support this argument, JHBMC cites the fact that CON regulations governing interested party status in the CON review process and the requirements for a judicial appeal of a CON decision share the phrase "adversely affected."

Maryland principles of statutory construction militate against JHBMC's interpretation of COMAR 10.24.01.01(B)(2)-(3). "Absent a clear indication to the contrary, a statute, if reasonably possible, is to be read so that no word, clause, sentence or phrase is rendered surplusage, superfluous, meaningless, or nugatory...." *Walker v. Lindsey*, 65 Md. App. 402, 407, 500 A.2d 1061, 1064 (1985).

The Commission's regulations have provided the following criteria for an "interested party" in a CON review:

"Adversely affected", for purposes of determining interested party status in a Certificate of Need review, as defined in § B(19) of this regulation, means that a person: [...] (d) Can demonstrate **to the reviewer** that the person could suffer a potentially detrimental impact from the approval of a project before the Commission, **in an issue area over which the**

Commission has jurisdiction, such that the reviewer, in the reviewer's sole discretion, determines that the person should be qualified as an interested party to the Certificate of Need review.

COMAR 10.24.01.01(B)(2) (emphases added).

The Commission's regulation regarding judicial review states: "**In order to take a judicial appeal**, an interested party **must be** an aggrieved party." COMAR 10.24.01.09(F)(2).

"Aggrieved party" is defined as:

(a) An interested party who:

- (i) Presented written comments on an application to the Commission, both to the reviewer and in the form of exceptions to a proposed decision that is adverse to the position of that person, *and*
- (ii) Would be adversely affected by the final decision of the Commission.

COMAR 10.24.01.01(B)(3)(a)

Here, COMAR 10.24.01.01(B)(2) provides a definition of "adversely affected" for the express purpose of determining interested party status in a CON review. The mere fact that the phrase "adversely affected" is employed does not mean that the Commission is adopting the definition of "adversely affected" used in the judicial review context. The Commission's regulation regarding judicial review explicitly states that "**[i]n order to take judicial appeal**, an interested party **must be** an aggrieved party," indicating that an "interested party" in the CON proceeding is not by default an aggrieved party for the purpose of judicial review. Similarly, an aggrieved party is defined as an interested party that submitted comments in a CON proceeding "**and** [w]ould be adversely affected by the final decision of the Commission." COMAR 10.24.01.01(B)(3)(a)(emphasis added). A conflation of an "interested party"

for the purpose of CON review with an “aggrieved party” for the purpose of judicial review would render the bolded language above superfluous and meaningless. In fact, the two standards are distinct.^{2,3}

In previous filings, the Community Groups have already described in detail how they would be detrimentally impacted in areas under the Commission’s jurisdiction, and refer the Reviewer to those documents.

The Community Groups Have Complied With COMAR 10.24.01.08(F)(1)(d)

JHBMC argues that we have failed to provide appropriate documentation or affidavits for our assertions regarding ourselves, who we represent, and JHBMC’s medical debt lawsuits. We disagree.

COMAR 10.24.01.08(F)(1)(d) does not define what qualifies as “appropriate documentation” or the precise requirements for a sworn affidavit in support of an interested party’s factual assertions. Where the evidentiary hearing is what ultimately produces the “record upon which the proposed decision can be based,” the Commission’s regulations on that topic provide guidance in resolving this dispute. COMAR 10.24.01.11(A)(1).

At the evidentiary hearing stage, the regulations permit “reliable and probative documents previously filed with...the Commission...that are relevant to issues being considered by the Commission [to] be incorporated by reference into the record,” and a reviewer may take notice of certain “judicially cognizable facts” (upon request of a party or the reviewer’s own motion) and “general technical or

² As discussed in previous filings, it would be inappropriate for an administrative agency to usurp a judicial function: “the determination of whether a person has standing to maintain an action in court is exclusively a judicial function.” *Sugarloaf Citizens’ Ass’n, Sugarloaf Citizens’ Ass’n v. Dep’t of Env’t*, 344 Md. 271, 290 (1996).

³ As a further illustration of the difference between the CON review and judicial review processes, the Commission is required to consider the “[v]iability of [a] [p]roposal,” including “the availability of... community support...” for a proposal in its evaluation of CON applications. (Overview of Maryland Certificate of Need (CON) Program: http://mhcc.maryland.gov/mhcc/pages/hcfs/hcfs_con/hcfs_con_overview.aspx.) Here, the AFL-CIO’s interested party comments are clearly probative of the availability of “community support” (or a lack thereof) for JHBMC’s CON application, consequently fall within the scope of “an area over which the Commission has jurisdiction,” and warrant the Commission’s consideration.

scientific facts within the specialized knowledge of a member of the Commission.” COMAR 10.24.01.11(A)(3)(f)-(g).

In Maryland, “judicially cognizable facts” include: “(1) law (both enacted law and case law); (2) legislative facts (broad social policies on which the law is or should be based); and (3) adjudicative facts (facts that played a direct role in the controversy giving rise to the trial at hand: historical, scientific, or other facts that tend to answer the questions of who did what, when, where, how, and why in the case).” 5 Maryland Evidence, § 201:1.

“A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” Md. Rule 5-201.

As we have maintained throughout this proceeding, the basic facts regarding the nature and attributes of our organizations are true on their face and commonly known, and therefore do not require affidavits or documentation pursuant to Rule 5-201.

Similarly, we have provided ample “reliable and probative” documentation in support of our review of JHBMC’s medical debt collection practices, including in our initial interested party comments. However, as a courtesy, we subsequently provided an affidavit by Mr. Rabourn, the primary researcher for the medical debt collection review, which explained our research methodology and attached several exhibits including tables with our source data. (Accordingly, we refer the Reviewer and the Commission to pp. 9-21 of our Interested Party Comments, and pp. 6-7 of our Reply to JHBMC’s Response to our Interested Party Comments.) The affidavit and the filing to which it was attached (our reply comments) each describe and serve to sufficiently authenticate the exhibits, which are “reliable and probative” documents. Moreover, we believe that the lawsuits and U.S. Census data referenced therein are also

judicially noticeable under Rule 5-201, and the Community Groups need not provide a separate sworn affidavit with respect to the compilation of this data by the AFL-CIO's software.

JHBMC Does Not Comply With Charity Care Standard

Bayview states the following on page 12 of its response letter: "JHBMC's charity care policy [...] requires that information about the availability of charity care to be provided before discharge, which is consistent with providing the notice prior to admission." This assertion is untrue. Providing charity care before discharge is not consistent with providing notice prior to admission. The hospital must be required to change its policy to comply with the State Health Plan.

Regarding JHBMC's denial of charity care to non-citizens, the hospital states on page 13 of its response letter that "The Commenters failed to raise this issue in their initial Comments, so this is outside the scope of a reply." The Commission has no rules or standards that dictate what falls within or beyond the scope of a reply from an interested party, and it can decide for itself what information to take into account. Beyond that point, Exhibits 6 and 7 of JHBMC's response to our Interested Party Comments, submitted on 3/11/2019, provided new information regarding the denial and discouragement of noncitizens from applying for charity care that was not previously available, and thus necessitated our response. Both of those documents, titled "Patient Handbook" and "Understanding Your Medical Bills," had not previously been disclosed. They both list being a US citizen or legal resident as the first qualifying factor in the consideration of charity care. As we discussed in our previous reply, JHBMC's charity policy states that non-citizens may in fact receive charity care if they reside in neighborhoods surrounding the hospital, which include the 10 zip codes identified in the hospital's Community Health Needs Assessment (Exhibit 11 of the CON Application Docket No. 18-24-2430). Thus, those new exhibits show that JHBMC is actively communicating to its undocumented immigrant patients

that they are not qualified to apply for charity care, when in fact, according to its own policies, they are eligible to receive charity care in many cases.

The contradiction between JHBMC's written charity care policy and what it communicates to its patients is all the more alarming when one considers that over half of all undocumented immigrants in Maryland are uninsured, and that they make up over 34% of the total uninsured population in the state.⁴ JHBMC is cruelly and needlessly excluding a large number of uninsured patients from access to charity care. By refusing to provide financial assistance to a group of people who make up over a third of the uninsured population in Maryland, JHBMC is violating the charity care standards of the State Health Plan and Maryland law, which make clear that low-income and uninsured patients must have access charity care (COMAR §10.24.10 and COMAR §10.37.10.26). The hospital must be required to change its policy to comply the State Health Plan and Maryland law.

JHBMC states on page 14 of its response letter that the Commission does not interpret its charity care standard to prohibit a citizenship requirement, and supports this claim by listing a number of past Johns Hopkins projects that achieved CON approval with similar or identical charity care policies. This argument is incorrect. The fact that the Commission has awarded CONs for Johns Hopkins projects in the past does not mean that it fully considered the rights of non-citizen access to charity care in those cases, or that it was alerted to the fact the Johns Hopkins Hospital and JHBMC were violating their own charity care policies by informing undocumented immigrants that they were ineligible for charity care when their written policies indicated otherwise. If the Commission has not fully considered these particular issues in the past, it has every right to do so now.

⁴ Sources include the Migration Policy Institute for uninsured undocumented immigrant population <https://www.migrationpolicy.org/data/unauthorized-immigrant-population/state/MD> and Kaiser Family Foundation for total uninsured in Maryland: <https://www.kff.org/other/state-indicator/total-population/?dataView=1¤tTimeframe=0&selectedRows=%7B%22states%22:%7B%22maryland%22:%7B%7D%7D%7D&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D>

JHBMC states on page 15 of its response letter that our analysis of its medical debt collections practices provides no evidence that it failed to properly carry out its charity care policy. We believe the data we presented provides ample circumstantial evidence that the hospital may be failing to inform its indebted former patients about the availability of charity care and discouraging them from applying. In addition, we have now received personal testimony that this is in fact the case. The personal statements of multiple individuals sued for medical debt by JHBMC and Johns Hopkins Hospital, which shares its charity policy document with JHBMC (Exhibit 11 of the CON Application Docket No. 18-24-2430), show that the hospitals failed to inform their indebted patients about the availability of charity care, as our medical debt study indicated. The details listed below, along with our analysis of JHBMC's predatory medical debt collections practices, provide compelling evidence of the hospital's failure to carry out its charity care policy.

- **Lakesha Spence:** In 2015, Lakesha Spence was admitted to Bayview for medical treatment. She had insurance at the time through her job as a security guard. She never received any information about financial assistance or charity care. JHBMC filed a lawsuit against Lakesha in 2016 seeking \$4,821 in alleged medical debt. She told them that she could not afford to pay her medical debt while supporting both her mother, who lives with her, and her son. She owed at least \$1,800 to Johns Hopkins Hospital for the birth of her son in 2016. In discussions with Hopkins representatives, Lakesha has insisted that she could not pay her medical debts and still support herself and her family. Rather than being told about the availability of financial assistance, the hospital representatives insisted they would keep calling back to "check if her situation has changed." Lakesha states that she cannot pay down her alleged medical debt to JHBMC and still afford to pay for food, rent, and other essential expenses. In March of this year,

JHBMC sought and received a court order for a Writ of Garnishment of Property. Her bank account was zeroed out in April.⁵

- **Eric Simmons:** In 2013, Eric Simmons went to Johns Hopkins Hospital for an ankle injury that ultimately caused him to lose his job at a bakery. Eric later got a more difficult job at Amazon. In 2014, Eric was sued for \$524 for his hospital visit and had his Amazon wages garnished by Johns Hopkins Hospital to pay for his alleged medical debt. He was never told about the availability of financial assistance. “[Hopkins] withheld information from me, information that could have helped me and my family...Years later, we’re still playing catch-up.”⁶
- **Mary Scott:** In 2016, Mary Scott went to the Johns Hopkins Hospital ER for acute bronchitis, lacking insurance, but employed on modified compensation as a medical records clerk. She was not told about any financial assistance, free or reduced care, or charity care. Hopkins sued her in July 2017 for the ER visit and obtained a judgment against her two months later. Mary then began dealing with someone called “Ms. Smith” from “JH Law.” She agreed to pay \$100 per month and did so for about five months with the help of her adult children. The debt was so great, however, that Mary declared bankruptcy in November 2018. This has all affected Mary’s anxiety and well-being tremendously. “They should really emphasize that charity care is available. Every patient should be informed. The way they go after people is aggressive, especially for

⁵ From the personal statement of Lakesha Spence on 2/17/2019 and 4/11/2019; Case No. 010100117842016, Baltimore City District Court; Case No. 010100282962016, Baltimore City District Court

⁶ From the personal statement of Eric Simmons on 2/16/2019; and Case No. 010100132652014, Baltimore City District Court.

those of us that are living paycheck to paycheck. Hopkins should find some compassion for its patients because their current practices can cause financial devastation.”⁷

Conclusion

Based on the issues raised above and in our previously filed comments, the Community Groups respectfully requests that the Commission delay approval of the requested CON until JHBMC has fully addressed and remedied these concerns. Failure to require JHBMC to do so will cause adverse impacts upon our organizations and our members who live and work in the service area of the hospital. Furthermore, in light of disputes over the accuracy of our analysis of JHBMC’s medical debt collections practices and the personal statements from former JHBMC and JHH patients outlined above, we are restating our request for an evidentiary hearing that would allow us to present oral arguments prior to the preparation of a proposed decision.

Respectfully submitted,

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Peter Sabonis, United Workers; Charm City Land Trust

A handwritten signature in black ink, appearing to read 'Chelsea Gleason', written over a horizontal line.

Chelsea Gleason, Sanctuary Streets

⁷ From the personal statement of Mary Scott on 2/17/2019; and Case No. 080400129162017, Baltimore County District Court.